MEMORANDUM OF LAW

DATE: July 11, 1991

TO: George Arimes, Assistant Planning Director

FROM: City Attorney

SUBJECT: Appeal Process

You have requested our office research the extent to which the City of San Diego ("City") may restrict the appeal process for land use decisions. After researching this issue, we have concluded the following:

1. Although there is no right to an administrative appeal, we suggest the City take a cautious approach and establish an appeal procedure for all of its land use decisions. Once an appeal procedure is established, such procedure can not be limited to only dissatisfied applicants. However, the City may limit the number of appeals provided for each land use decision.

2. The City Council does not have to be the final decision making body in every instance, unless mandated by state law.

3. The City may establish procedures for its appeal process. Such procedures may include imposing a reasonable fee and requiring the appealing party to raise their objections at an earlier hearing.

4. The City Council does not have to hold a de novo hearing for each appeal it considers.

5. A charter city may not abrogate a person's statutory right to an administrative appeal granted by the State of California ("State").

ANALYSIS

A. RIGHT TO APPEAL.

A judicial review of a land use decision is guaranteed by the due process clause of the United States and the State Constitutions, however there is no similar constitutional right to appeal such decision to the local governing body or appeal board. In fact, the court in Lagrutta v. City Council, 9 Cal. App. 3d 890, 894 (1970), stressed the importance of distinguishing between a judicial review of a zoning decision and an administrative appeal of such decision. An administrative appeal is not subject to the same restrictions as a judicial review.

Furthermore, the Attorney General has opined that individuals do not have a right to appeal to the governing body of a city or county.F For most cities the governing body is the City Council, and for most counties the governing body is the Board of Supervisors.

Atty. Gen. Op. 339 (October 1990). The Attorney General reasoned that the State Legislature may exercise all powers not forbidden by the United States or State Constitution. Nothing in either Constitution prevents the state legislature from designating a decision made by a city advisory agency or appeal board as the final administrative action taken by the city. The Attorney General does note that procedural due process principles may impose some restrictions upon quasi judicial actions taken by the State Legislature.

Charter cities are provided, by the state Constitution, with the power to "make and enforce within its limits all local, police, sanitary and other ordinances and regulations as long as such matters are not in conflict with general laws." (Cal. Const., Art. XI, S7) Therefore a charter city has "police powers" over its municipal affairs, including land use matters, subject only to constitutional limitations and matters of statewide concern. Associated Home Builders etc., Inc. v. City of Livermore, 18 Cal. 3d 582 (1976). Consequently, the State Zoning Law (Government Code section 65100 et seq.) does not generally apply to charter cities, except for a patchwork of provisions that expressly apply to charter cities. Government Code sections 65700(a) and 65803. See also, Verdugo Woodlands Homeowners etc. Assn. v. City of Glendale, 179 Cal. App. 3d 696 (1986).

However, it is important to note that the State Zoning Law is more restrictive than either the State or Federal Constitution in that it provides for some sort of an appeal to the governing body or to an appeal board in every instance. For example, counties and general law cities are empowered to establish a board of appeals to hear appeals from decisions on applications for variances and conditional use permits. Government Code section 65900. If a board of appeals is not established, the local legislative body exercises this function. Government Code section 65904.

Decisions regarding rezonings and general plan amendments are also provided with a type of appeal process. An application for rezoning is usually heard by the Planning Commission which makes a recommendation to the governing body of a jurisdiction. Government Code section 65854. If the Planning Commission recommends against a rezoning, a hearing before the governing body is not required. However an interested party may request such a hearing in writing within five days. Government Code section 65856. In addition a city must establish procedures for any interested party to file a written request for a hearing by the city council after the planning commission has taken action on an amendment to the general plan. Government Code section 65354.5. Such provisions are not applicable to charter cities.

In addition, the court in the often cited case of Concerned Citizens of Murphys v. Jackson, 72 Cal. App. 3d 1021 (1979), concluded that the

right to some kind of appeal from a quasi judicial decision is an integral element of the land use process. The planning commission for the County of Calaveras granted a conditional use permit for the construction of a mineral recovery plant, over the objection of the adjacent property owners. The owners of the subject property promptly filed an appeal application with the County Board of Supervisors. The Clerk of the Board of Supervisors would not accept this appeal application because as provided by the County Zoning Ordinance only the applicants could appeal the planning commission's decision.

The court explained that Government Code sections 65030 and 65033 expresses a clear legislative intent that planning agencies ensure participation by the public in the planning process. The legislature intended to involve members of the community in every level of the planning process. Through that involvement owners are granted the right to participate in the hearing process and that involvement inherently carries the right of appeal which may not be restricted by local ordinance. In conclusion, the court reasoned that local legislative bodies have the authority to establish procedures for an appeal, but they did not have the power to restrict the right of appeal.

There is no California decision that provides us with an unequivocal answer as to whether a charter city must provide individuals with the right to appeal a land use decision. However it is well established that charter cities may exercise police powers over land use matters subject only to constitutional limitations and matters of state wide concern. Moreover there is no constitutional right to an administrative appeal and appeal procedures provided by the State Zoning Law are inapplicable to charter cities.

However, we advise that some appeal mechanism be established for land use decisions because it is impossible to predict with absolute accuracy whether a court would require a charter city to provide the same procedural safeguards as provided by the State Zoning Law. The provisions found in the State Zoning Law regarding the appeal process are more restrictive than any constitutional requirement. In addition, the court in Concerned Citizens of Murphys concluded that the right to appeal a land use decision is an integral element of the planning process. But nothing prevents a charter city from limiting the number of appeals available to an interested party, nor is the governing body required to hear each appeal.

In any event, it is clear that a city cannot limit the right to appeal to only the dissatisfied applicants. Id. at 1021. In addition the court in Mack v. Ironside, 35 Cal. App. 3d 127 (1973), held that the city council may appeal a decision of the planning commission. The court reasoned that the city ordinance allowing "any person" to appeal a decision of the city planning commission included the city council.

B. APPEAL PROCESS.

A local agency is free to establish procedures for its appeal process. Such procedures may include imposing a reasonable fee and requiring the appealing party to raise their objections at an earlier hearing.

1. Cities may establish reasonable fees for appeal applications.

The State Zoning law authorizes local agencies to establish and charge fees for the processing of land use permits. Government Code section 65104 provides that cities, including charter cities, may establish fees to support the work of its planning agency.

The Court in Sea & Sage Audubon Society, Inc. v. Planning Com., 34 Cal. 3d 412 (1983), upheld the city's right to impose a fee on any interested person who invoked its local appeal process as long as such fee was reasonable. Although the Court did not determine whether the fee imposed by the city in that particular instance was reasonable, it did list factors which would determine whether such fee would be considered reasonable by the court. The court considered the following factors: 1) the full range or nature of the administrative services and functions which are properly covered by the fee; 2) the reasonable cost of such services and functions; or 3) whether the fee structure in question bears a reasonable relationship to such costs. Id. at 421.

2. City may establish "standing" requirements.

In addition, the local agency may require the appealing party to raise objections at an earlier hearing in order to have "standing" to raise the appeal. The concept of requiring the appealing party to raise their objections at an earlier hearing is not uncommon. The doctrine of "exhaustion of administrative remedies" is similar in theory and is applied to the judicial review of a governmental action.

The doctrine of exhaustion of administrative remedies requires that before an issue may be litigated, the plaintiff must have raised the issue before the administrative agency or must have exhausted the necessary administrative remedies. In other words, a person must have exhausted available remedies before appealing decisions up the appellate ladder and must have raised the issues at the various public hearings either by discussion or written correspondence. Coalition for Student Action v. City of Fullerton, 153 Cal. App. 3d 1194 (1984).

Similarly, the court in Concerned Citizens of Murphys spoke about providing the right to appeal to those individuals who participated in the planning process. The court believed that the legislature recognized the importance of public participation at every level of the planning process and it was this participation that "inherently carries the right of appeal." Id. at 1021 and 1026.

In addition the California Coastal Act of 1976 (Public Resources Code section 30000 et seq.) provides that an applicant or any person aggrieved by an approval of a permit by the regional commission may appeal such

decision to the State Commission. (Public Resources Code section 27423.) The term "aggrieved" is defined by Section 13903 of Title 14 of the California Administrative Code as one who is dissatisfied with a determination of the Regional Commission, and who had opposed the application on which the Regional Commission's determination was made, in person at the public hearing or by letter or other appropriate means suitable to inform the Commission of the nature of the opposition, or would have opposed the application but for good cause was unable to do so.

The court in Marina Plaza v. California Coastal Zone Conservation Com., 73 Cal. App. 3d 311, 321 (1977), followed this definition of an aggrieved person for purposes of determining whether the appellants could appeal to the State Commission. The court held that two of the appellants had appeared before the regional commission to oppose the permit, therefore they were aggrieved within the meaning of this term.

The court in Pillsbury v. South Coast Regional Com., 71 Cal. App. 3d 740 (1977), found that the individuals appealing the Regional Commission's decision to the State Commission would have appeared before the regional commissions but, for good cause, were absent. The court concluded that the Regional Commission improperly noticed the public hearing and that for this reason the individuals were not present at the Regional Commission's meeting. Therefore, such persons were free to appeal the decision to the State Commission. The court also noted that all three petitioners were aggrieved within the broad definition espoused in Klitgaard & Jones, Inc. v. San Diego Coast Regional Com., 48 Cal. App. 3d 99 (1975). Pillsbury v. South Coast Regional Com., at 750.

The court in Klitgaard greatly expanded the definition of "aggrieved". This was not followed by the courts in the subsequent cases of Marina Plaza or Pillsbury. The court in Klitgaard commented that it was not willing to narrow the interpretation of the term "aggrieved" as to do harm to the purpose of the Act. Therefore the court concluded that an aggrieved person is one who was either a resident of California, a citizen of California or has a pecuniary or proprietary interest in the outcome of a permit hearing.

3. A full de novo hearing need not be conducted for each appeal.

In addition, a full de novo hearing is not required each time an appeal is considered. The court in Smith v. County of Los Angeles, 211 Cal. App. 3d 188 (1989), held that the Board of Supervisors need not hold a hearing whenever they review an appeal of a planning commission decision.

In Smith an applicant for a conditional use permit for an adult cabaret appealed the decision of the planning commission denying the permit. The applicant requested a trial de novo hearing. The Board of Supervisors was permitted to take one of four options in considering an appeal: affirm the action of the commission; refer the matter back to the

commission; require a transcript of testimony and take such action as was warranted by the evidence; or set the matter for a de novo hearing before the board.

The Board of Supervisors at a subsequent public meeting voted unanimously to affirm the commission's decision and deny the conditional use permit without holding a public hearing. The court concluded that the Board of Supervisors need not hold a public hearing whenever it reviewed a planning commission decision.

However, a city has the right to hold a de novo hearing when considering an appeal, if it so desires. Lagrutta v. City Council, 9 Cal. App. 3d 89 (1970). In Lagrutta, the property owners appealed a decision of the planning commission which granted a conditional use permit for a mobile home park. The city council held a full hearing on the matter, allowing everyone to be heard. The city council subsequently reversed the action of the planning commission.

The property owners objected to the city council holding a second full hearing to consider the appeal. They argued that the council, sitting as an appellate body, could not consider new evidence, but that they could only consider the transcript of the previous hearing before the planning commission. The court concluded that administrative reviews are not limited in scope. In fact in most jurisdictions appeals are de novo proceedings in which the entire case is repeated.

For the reasons stated above, we conclude that the City may, but is not required to, hold a de novo hearing when considering an appeal application. The City may elect a procedure whereby the appellate body may take one of four options when considering the appeal: affirm the action of the lower decision making body; refer the matter back to the lower decision making body; require a transcript of testimony and take such action as is indicated by the evidence; or set the matter for a de novo hearing.

C. STATE MANDATES - CHARTER CITIES.

In addition, legislation which is of "statewide concern" must be followed by charter cities. A charter city may not abrogate a person's statutory right to an administrative appeal granted by the State Legislature. 73 Atty. Gen. Op. 339, 345. The State requires charter cities to comply with state law in the following matters, as such relates to the appeal process:

1. Subdivision Map Act.

a. When a local ordinance has designated the advisory agency to approve or disapprove a tentative map, the subdivider or tenant in a conversion to condominium, community apartment, or stock cooperative has a right to appeal the decision to the legislative body or to an appeal board (if the local ordinance provides for an appeal board). Government Code section 66452.5(a).

1) The appeal must be taken within 10 days to

either the appeal board or the legislative body. The board or body shall set the matter for hearing. Government Code section 66452.5(a).

2) Notice of the hearing shall be provided at least three days prior to the hearing. Government Code section 66452.5(a).

3) Such a hearing is required to be held within 30 days after the date of request, and a decision must be rendered within 10 days after the hearing. Government Code sections 66452.5(a) and (b).

b. If a local ordinance provides for an appeal board, either the subdivider or the advisory agency may appeal the decision of the appeal board to the legislative body, which body shall set the matter for hearing. Such a hearing shall be held within 30 days after the date of filing the appeal and a decision must be rendered within 10 days thereafter. Government Code section 66452.5(b).

c. An interested person may appeal to the city council a parcel and tentative map determination made by a city advisory agency or appeal board. Government Code section 66452.5(a).

The Attorney General has opined that a planning director is an "interested person" for purposes of appealing a decision of the planing commissioners on a tentative subdivision map. 71 Atty. Gen. Op. 326 (Dec. 1988).

2. Government Code section 65804.

Charter cities are required to establish minimal procedural standards to regulate zoning hearings. This means that once an appeal process is established by a charter city, it must provide a procedure for such appeals.

3. California Coastal Act of 1976 (Public Resources Code section 30000 et seq.)

a. As discussed above, an applicant or any person aggrieved by an approval of a permit by the regional commission may appeal such decision to the State Commission. Public Resources Code section 27423.

1) The term "aggrieved" is defined by Section 13903 of Title 14 of the California Administrative Code as one who is dissatisfied with a determination of the Regional Commission and who had opposed the application on which the Regional Commission's determination was made in person at the public hearing or by letter or other appropriate means suitable to inform the Commission of the nature of the opposition, or would have opposed the application but for good cause was unable to do so.

CONCLUSION

We have concluded that the City should establish an appeal procedure

for its land use decision. However the City is free to limit and regulate the appeal process. The City may establish reasonable fees to charge individuals appealing a matter and may require such individuals to have participated at an earlier hearing. In addition the City Council does not have to hear each appeal application. Nor does a de novo hearing have to be provided for each appeal. In any event the City can not abrogate a person's statutory right to an appeal granted by the State Legislature.

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